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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA, )

9 Plaintiff, )

10 vs. )

11 JOSEPH JEFFEREY BRICE, )

12 Defendant. )

11-CR-00075-LRS

United States' Memorandum  
Re: Jurisdiction

13 Plaintiff, United States of America, by and through Michael C. Ormsby,  
14 United States Attorney for the Eastern District of Washington, and Russell E.  
15 Smoot, Assistant United States Attorney for the Eastern District of Washington,  
16 respectfully submits the United States' Memorandum Re: Jurisdiction:

17 MEMORANDUM

18 On May 25, 2012, this Court requested the parties to brief the issue of  
19 whether this Court is divested of jurisdiction as a consequence of the Defendant's  
20 filing of a Notice of [Interlocutory] Appeal of this Court's orally-pronounced  
21 determination that none of the documents provided *in camera* on May 22, 2012,  
22 contained attorney-client privileged material. The United States respectfully  
23 submits that this Court has not been divested of jurisdiction over *United States v.*  
24 *Brice*, 11-CR-00075-LRS.

1 In *United States v. Linton*, 502 F.Supp. 871, 874 (D.C.Nev. 1980),<sup>1</sup> the court  
2 explained:

3 As a general rule, once a notice of appeal has been filed a United  
4 States district court is divested of jurisdiction to take any action  
5 except in aid of the appeal. *See Ruby v. Secretary of United States*  
6 *Navy*, 365 F.2d 385 (9th Cir. 1966), *cert. den.* 386 U.S. 1011, 87 S.Ct.  
7 1358, 18 L.Ed.2d 442 (1967). However, an attempted appeal from a  
8 nonappealable order does not deprive the trial court of jurisdiction.  
9 *Resnik v. LaPaz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961); *Hoffman,*  
10 *Etc. v. Beer Drivers & Salesmen's, Etc.*, 536 F.2d 1268 (9th Cir.  
11 1976). The procedural guidelines for the district court judge are aptly  
12 set forth in *Ruby*, *supra*, at page 389:

13 “Where the deficiency in a notice of appeal, by reason of  
14 ... reference to a non-appealable order, is clear to the  
15 district court, it may disregard the purported notice of  
16 appeal and proceed with the case, knowing that it has not  
17 been deprived of jurisdiction. If the district court is in  
18 doubt as to whether the notice of appeal is inoperative by  
19 reason of ... such defect, it may decline to act further  
20 until the purported appellee obtains dismissal of the  
21 appeal in the court of appeals. In the rare instance where  
22 the district court proceeds with a case under the mistaken  
23 belief that a notice of appeal is inoperative, the appellant  
24 may apply to the court of appeals for a writ of  
25 prohibition.”

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<sup>1</sup>The United States recognizes that decisions by the District Court for the District of Nevada are clearly not binding on this Court. Upon review of the issue under the Court’s time-frame and pleading-length restriction, the United States submits that principles set forth in *Linton* directly answer this Court’s inquiry.

1 In this case, the Defendant indicated in his Notice of Appeal that the Order<sup>2</sup>  
2 he is appealing a

3 Ruling by Court that no violation of attorney-client or work product  
4 privileges occurred during search of legal and non-legal materials  
contained in Mr. Brice's cell at Spokane County Jail (ECF No. 272).

5 See ECF Doc. 274. In essence, the Defendant is simply attempting to appeal this  
6 Court's finding concerning the nature of seized documents. The United States  
7 respectfully submits that such a finding is not a "final decision of [a] district  
8 court" and, as such, does not provide a basis for an interlocutory appeal in either  
9 the civil or criminal contexts.

10 In *Mohawk Industries, Inc. v. Carpenter*, — U.S. —, 130 S.Ct. 599, 603  
11 (2009), the United States Supreme Court explained, in the civil context, that

12 Section 1291 of the Judicial Code confers on federal courts of appeals  
jurisdiction to review "final decisions of the district courts." 28  
13 U.S.C. § 1291. Although "final decisions" typically are ones that  
14 trigger the entry of judgment, they also include a small set of  
prejudgment orders that are "collateral to" the merits of an action and  
15 "too important" to be denied immediate review. *Cohen v. Beneficial*  
*Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed.  
16 1528 (1949). In this case, petitioner Mohawk Industries, Inc.,  
attempted to bring a collateral order appeal after the District Court  
17 ordered it to disclose certain confidential materials on the ground that  
Mohawk had waived the attorney-client privilege. The Court of  
18 Appeals dismissed the appeal for want of jurisdiction.

19  
20  
21 <sup>2</sup>Technically, the Defendant filed his Notice of Appeal after this Court orally  
22 pronounced its finding that the seized documents contained no privileged material.  
23 As the documents are presently in the possession of the United States (Federal  
24 Bureau of Investigation), there are no grounds for the type of disclosure or  
25 discovery order typically at issue in the civil matters that have addressed  
26 interlocutory appeal of such orders.

1 The Supreme Court discussed *Cohen* and ultimately held that “the collateral order  
2 doctrine does not extend to disclosure orders adverse to the attorney-client  
3 privilege [and that] [e]ffective appellate review can be had by other means.”  
4 *Mohawk Industries*, 130 S.Ct. at 609.

5 Here, the issue is not whether this Court has ordered a party to civil  
6 litigation to disclose potential attorney-client privilege material to the opposing  
7 party through the civil discovery process. Rather, the issue, in this criminal matter  
8 is whether this Court will release the assigned<sup>3</sup> Assistant United States Attorney  
9 from a self-imposed prohibition of reviewing material that the Federal Bureau of  
10 Investigation lawfully obtained from the U.S. Marshal Service. Whether such  
11 release, upon the finding that the documents presently in the possession of the  
12 United States do not contain privileged material, is characterized as a “disclosure  
13 order” or not, the end result is the same – the “release” or “disclosure” is not  
14 subject to interlocutory appeal.<sup>4</sup> As such, this Court is not divested of jurisdiction.

15 DATED March , 2012.

16 Michael C. Ormsby  
17 United States Attorney

18 *s/Russell E. Smoot*

19 Russell E. Smoot  
20 Assistant United States Attorney

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22 <sup>3</sup>Specifically assigned to the matter of *United States v. BRICE*, 11-CR-  
23 00075-LRS.

24 <sup>4</sup>Whether the Defendant has any other viable form of relief is not the issue  
25 before the Court.  
26

1 I hereby certify that on May 30, 2012, I electronically filed the foregoing  
2 with the Clerk of the Court using the CM/ECF System which will send  
3 notification of such filing to the following, and/or I hereby certify that I have  
4 mailed by United States Postal Service the document to the following non-  
5 CM/ECF participant(s):

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7 Matthew Campbell  
8 Federal Defenders  
9 10 North Post Street, Suite 700  
10 Spokane, WA 99201

11 *s/Russell E. Smoot*

12 Russell E. Smoot  
13 Assistant United States Attorney  
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